

**BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION**

THOMAS R. STAGGS

Claimant

VS.

IBP, INC.

Respondent

Self-Insured

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Docket No. 217,367

ORDER

Respondent appeals from a preliminary hearing Order entered by Administrative Law Judge Floyd V. Palmer on October 27, 1997.

ISSUES

Although described differently in the application for review, respondent's contentions can be summarized as follows: respondent contends claimant has failed to show that he suffered an injury to his right shoulder arising out of and in the course of his employment, has failed to show that he gave timely notice of injury to his right shoulder, and has failed to show timely written claim for injury to his right shoulder. Respondent also argues the Administrative Law Judge (ALJ) exceeded his jurisdiction when he allowed claimant to amend his claim at the preliminary hearing on October 24, 1997, to include a claim for injury to the right shoulder.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

For reasons explained below, the Board finds the decision by the Administrative Law Judge should be reversed.

The issues arise in the following procedural context. Claimant first filed an Application for Hearing in this case on October 24, 1996. The application alleged accidental injury on or about June 1, 1996, when claimant was struck by two pallets which slid from a front-end loader. The application alleged injury to claimant's "left upper extremity, shoulder

and back and all related systems.” The claim was assigned Docket No. 217,367. On November 25, 1996, claimant filed an Amended Application for Hearing. The amended application changed the alleged date of accident to July 23, 24, or 25, 1996, but otherwise restates the original allegation, including the allegation that the injury was to claimant’s left upper extremity, shoulder, back, and related systems. Claimant filed an Application for Preliminary Hearing (E-3) along with his first Application for Hearing (E-1) but no preliminary hearing was held, (presumably because respondent was providing medical treatment) until October 1997. At that preliminary hearing, claimant sought, for the first time, treatment for injury to his right shoulder.

There does not appear to be any dispute regarding compensability of the left shoulder injury. There also does not appear to be any dispute that claimant has injured his right shoulder and has a torn rotator cuff. Surgery has been recommended. There are three possible work-related sources for the right shoulder injury. They will be discussed here separately.

First, claimant complained of pain in his right shoulder when he saw H. Russel Bradley, M.D., on May 21, 1996, approximately two months before the injuries alleged in the Application for Hearing filed in this case. Dr. Bradley’s notes from that visit indicate claimant’s right shoulder would pop and grind and the problem seemed to be getting worse over time. Dr. Bradley’s notes also mention that claimant works repairing gasoline engines five days a week. Claimant has not alleged a compensable injury in May of 1996. He did, however, testify to the onset of right shoulder complaints in May 1996 and testified that he notified respondent of the complaints.

The ALJ relied, in part, on the May 1996 complaints to establish notice. The Appeals Board finds that notice of the May 1996 complaints does not satisfy the notice requirements of K.S.A. 44-520. The evidence does not establish the complaints were caused by claimant’s work for respondent. As indicated, the notes of Dr. Bradley mention work repairing gasoline engines. The record shows that claimant was working for respondent at the time as a welder but does not show that he did work repairing engines. Even if the engine repair work was for respondent, the evidence does not establish the engine repair work was the cause of an injury. Finally, the record contains no medical opinion which ties claimant’s current problems to work done in May 1996.

The second possible work-related source of claimant’s right shoulder injury was the accident in July 1996 when pallets fell on claimant. This is the accident which claimant now alleges caused his right shoulder injury. The Board finds, however, claimant has failed to prove his right shoulder injury resulted from the accident in July 1996. The Board also finds claimant did not make timely written claim for a July 1996 right shoulder injury.

Claimant testified that in July 1996, pallets fell on his shoulders. According to claimant, he mentioned right shoulder complaints to the treating physician, Dr. Michael L. Montgomery. Dr. Montgomery testified, however, that he does not recall, and his records

do not reflect, any complaints to the right shoulder. Respondent's internal report of injury, the initial emergency room records, and Dr. Montgomery's records of treatment from September 1996 until July 1997 mention only the left shoulder. Dr. Montgomery treated only the left shoulder and the first mention of the right shoulder is in the notes from claimant's visit on July 25, 1997. At that time, claimant advised Dr. Montgomery that he thought he injured his right shoulder in 1996 when he injured his left shoulder.

In addition the record contains no medical opinion which attributes claimant's current right shoulder injury to the accident of July 1996. Dr. Montgomery opines that the right shoulder is not directly related to the accident in 1996. Dr. Sergio Delgado concludes claimant's work is a potential cause but does not appear to attribute the injury to the accident in July 1996. The Board concludes claimant has not proven by a preponderance of the credible evidence that his current right shoulder injury was caused by his accident in July 1996.

The Board also finds claimant has not made timely written claim for accidental injury to his right shoulder in July 1996. Again, claimant has made no written claim for injury to his right shoulder except for the amendment to his written claim authorized by the ALJ at the time of the preliminary hearing in October 1997. This amendment does not avoid the time limits for filing written claim. Workers Compensation proceedings are not intended to be bound by technical procedures or pleading requirements. Procedural requirements cannot, however, be ignored to the disadvantage of the employer.

Limits on amendments to a written claim are discussed in Pyeatt v. Roadway Express, Inc., 243 Kan. 200, 756 P.2d 438 (1988). In that case, claimant injured his low back first in January 1983 and made a timely written claim for that injury. Claimant then injured the same portion of his back in March 1993. For the March 1993 injury, he completed the employer's accident report but made no separate written claim. In three subsequent preliminary hearings, claimant testified about the March 1993 aggravation. At the time of the regular hearing, respondent argued claimant's disability was caused by the March accident and the claim should be barred because claimant had not made a separate written claim for this accident. The Supreme Court disagreed and held the pleading (written claim) would, under these circumstances, conform to the evidence.

The current case differs materially from Pyeatt. In Pyeatt the Court noted:

This is not a case where the employer had no notice of Pyeatt's accidents or lacked knowledge that Pyeatt's claim for compensation was for the January accident and the March aggravation of the injury. Pyeatt did file reports of both accidents and a written claim for compensation for the first accident. He later filed three written applications for preliminary hearings and at each of the preliminary hearings evidence of both accidents was introduced.

The Court further stated:

The claim Pyeatt initially filed did vary from his subsequent claim and the proof offered at the disability hearing. Such variance is fatal if the employer is required to defend against an award of compensation for an unknown injury.

In this case, respondent knew claimant had right shoulder complaints in May of 1996 before the July accident. The Board finds respondent was otherwise unaware of problems in claimant's right shoulder until July 1997. Claimant was obligated to make written claim within 200 days of the accident. See K.S.A. 44-520a. The Board finds claimant did not make written claim within 200 days and, for the reasons stated, the amendment in October 1997 does not relate back or avoid the time limits.

Finally, the record contains some indication that claimant's right shoulder injury resulted from repetitive work activities and occurred gradually over a period which ended less than 200 days before the amendment to claimant's Application for Hearing. The Board concludes, however, claimant has failed to meet his burden to establish this to be so by a preponderance of the credible evidence. Dr. Montgomery's notes of July 25, 1997, state:

The patient is seen with complaint of right shoulder pain. The patient said he thinks he injured his shoulder back in 1996 when he injured the left shoulder. He says he's had a little trouble with it ever since then. I really don't have any documentation of that. I reviewed my initial office notes with him. At any rate he said now that he's back doing normal work his left shoulder is getting along fairly well but the right shoulder has just gotten to hurt more and more and it's gotten to the point now that he can barely use his right shoulder.

With the above history, Dr. Montgomery states that he cannot state to a reasonable degree of medical certainty that claimant's current right shoulder problems more probably than not result from his work.

Dr. Delgado describes the history in his letter report of September 2, 1997, as follows:

Since his original injury, Mr. Staggs states that he has increasing pain in the right shoulder with sensation of catching. He attributes this to his inability to use the left arm fully because of weakness

In Dr. Delgado's September 12, 1997, report to claimant's counsel, he then states:

I received your letter September 11, 1997. Within the realm of probabilities, the activities that he did at work would be a potential cause for the tears that occurred. It does not need to be on a repetitive activity basis. But, a single

incident superimposed on degenerative changes could cause the tear. The most logical place for it to occur would be at work which is confirmed by Mr. Staggs' complaints.

It appears Dr. Delgado is referring to history given in the letter from claimant's counsel. This September 11, 1997, letter from claimant's counsel is not in evidence. It is not clear whether Dr. Delgado is referring to the accident of July 1996, the complaints of overuse mentioned in the previous report, or more generally stating work is the most logical place for such an injury to occur. The Board finds Dr. Delgado's report alone too ambiguous to support claimant's claim.

In addition, claimant does not testify to gradual injury from work activities. He describes his work and mentions working with his right hand and some overhead. He does not describe, in his testimony, generally increasing problems with his right shoulder from his work. While the medical history in the records suggests gradual injury from claimant's work, claimant does not support this in his testimony. Dr. Montgomery states he cannot provide an opinion and Dr. Delgado gave an ambiguous opinion.

The Board finds claimant has not established injury to the right shoulder by repetitive trauma at work. He, likewise, has not established that his current right shoulder injury occurred from work in May 1996 or July 1996 or that he gave timely written claim for injury in May or July 1996.

WHEREFORE, the Appeals Board finds that the Order by Administrative Law Judge Floyd V. Palmer, dated October 27, 1997, should be, and the same is hereby, reversed.

IT IS SO ORDERED.

Dated this ____ day of February 1998.

BOARD MEMBER

c: Michael C. Helbert, Emporia, KS
Tina M. Sabag, Dakota City, NE
Floyd V. Palmer, Administrative Law Judge
Philip S. Harness, Director